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In the Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF THE STATE OF MAINE, PETITIONER

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAA Act) provides, with certain exceptions inapplicable here, that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). See also 49 U.S.C. 41713(b)(4)(A). The questions presented in this case are:

1. Whether the FAAA Act preempts a state law that requires a seller of tobacco products to use only delivery services that will take certain statutorily specified actions to ensure that the purchaser is not a minor.

2. Whether the FAAA Act preempts a state law that effectively requires a delivery service to change its package-processing procedures in order to avoid being deemed to have knowledge that a package contains tobacco products.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the United States' view, the preemption holding of the court of appeals is correct and does not merit this Court's review.

STATEMENT

1. The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, largely deregulated the domestic airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *TWA*, 504 U.S. 374, 378 (1992), the ADA preempted state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. As interpreted in *Morales*, that provision preempts state laws that "have a connection with, or reference to, airline 'rates, routes, or services.'" 504 U.S. at 384.

Two decades later, finding that state regulation of the transportation of property had "imposed an unreasonable burden on interstate commerce," "impeded the free flow of trade," and "placed an unreasonable cost" on American consumers, Congress passed the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1605. The FAAA Act further deregulated the transportation of property by both air and motor carriers by adding two sections modeled on the ADA's preemption provision. One of those provisions sets forth the following "General rule":

> Except as provided in subparagraph (B), a State * * * may not enact or enforce a law * * * related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier * * * when such carrier is transporting property by aircraft or by motor vehicle.

49 U.S.C. 41713(b)(4)(A). The other provision similarly states:

> Except as provided in paragraphs (2) and (3), a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) * * * with respect to the transportation of property.

49 U.S.C. 14501(c)(1).[1] This legislation was intended to extend to motor carriers the same rule of preemption of state laws related to prices, routes, and services that is embodied in the ADA as broadly interpreted in *Morales*. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 82, 83 (1994) (H. Rep. 677).

As indicated above, the FAAA Act preempts state law "[e]xcept as provided" in specified provisions that identify "[m]atters not covered." 49 U.S.C. 14501(c)(1) and (2)(A), 41713(b)(4)(A) and (B)(I). The matters "[e]xcept[ed]" from preemption are a State's "safety regulatory authority" with respect to motor vehicles; authority "to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo"; and authority to regulate certain motor carrier insurance requirements. *Ibid.* The transportation of household goods is also excluded. 49 U.S.C. 14501(c)(2)(B), 41713(b)(4)(B)(ii).

2. a. The State of Maine has, for some time, prohibited any person from selling, furnishing, or giving away tobacco products to any person under 18 years of age. See 22 Me. Rev. Stat. Ann. § 1555-B(2) (West Supp. 2006) (22 Me. Stat.); *id.* § 1555 (Supp. 1996). Prior to 2003, the State permitted the retail sale of tobacco products "only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the [State] to provide reliable verification that the purchaser is not a minor." *Id.* § 1555-B(1)

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[1] Section 14501(c)(1) was originally codified at 49 U.S.C. 11501(h)(1) (1994). See FAAA Act § 601(c), 108 Stat. 1606. It was amended and recodified in 1995. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 899.

(Supp. 1997). In 2003, Maine enacted a law to regulate "delivery sales of tobacco products within the State." An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 2003 Me. Laws ch. 444 (Tobacco Delivery Law); 22 Me. Stat. § 1555-C (2004). That law permits a tobacco retailer licensed by the State to sell tobacco products directly to consumers in response to phone, internet, or mail orders, provided that the retailer takes certain measures to ensure that such sales are not to minors. See *id.* § 1555-C(1), (2) and (3).

As pertinent here, the State requires a retailer that engages in delivery sales to "utilize a delivery service," 22 Me. Stat. § 1555-C(3)(C), which the statute defines as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers," *id.* § 1551(1-C). Before shipping, the licensed tobacco retailer must provide the delivery service with the age of the purchaser, and it must clearly mark the outside of the package with the retailer's name and state retailer's license number, as well as indicate that the contents are tobacco products. *Id.* § 1555-C(3)(A) and (B). The statute further provides:

> The tobacco retailer shall utilize a delivery service that imposes the following requirements:
>
> (1) The purchaser must be the addressee;
>
> (2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and
>
> (3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

Id. § 1555-C(3)(C).

b. In addition, "[a] person may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]," unless the delivery is to a licensed tobacco distributor or retailer. 22 Me. Stat. § 1555-D. The second sentence of Section 1555-D provides that "[a] person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)] or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General." *Ibid.*

3. Respondents are non-profit trade associations whose members provide transportation service. Respondents brought suit in 2003 against petitioner in his official capacity as Attorney General of Maine, seeking to enjoin enforcement of certain provisions of the State's Tobacco Delivery Law. The district court held both Sections 1555-C(3)(C) and 1555-D invalid under the preemption provisions of the FAAA Act. Pet. App. 54-66.

4. Petitioner appealed to the Court of Appeals for the First Circuit. The court of appeals rejected petitioner's contention that the FAAA Act preempts only a State's laws that impose traditional economic regulation on carriers, such as entry controls and tariff filing requirements, not laws that protect public health and welfare pursuant to the State's traditional police power. The court reasoned that "[a]n exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority." Pet. App. 18. While the court found some support in the legislative history for petitioner's argument that the FAAA Act preempts only state economic regulation, it concluded that—given the broad statutory text, the Act's structure, other legislative history, and the focus of this Court's decisions in *Morales* and *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), on the effect that a state law has on carrier operations—the Act was not so limited. Pet. App. 14-21.

The court of appeals next held that Section 1555-C(3)(C) is preempted under the FAAA Act because it "expressly references a carrier's service of providing the timely delivery of packages." Pet. App. 23. That section "prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines." *Ibid.* In response to petitioner's contention that Section 1555-C(3)(C) regulates tobacco retailers rather than carriers, the court ruled that such an argument "reads the broad phrase 'related to' out of the statute and replaces it with the narrower term 'regulates.'" *Ibid.* Moreover, the court of appeals explained, petitioner's argument "would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers." *Id.* at 24.

The court of appeals held that the first sentence of Section 1555-D, which generally bars any person from knowingly delivering contraband tobacco products, is not preempted by the FAAA Act. Because that part of Section 1555-D does not require carriers to "modify their delivery methods other than by declining to transport a product that Maine has legitimately banned," the court found that its effect on carrier services is "'too tenuous' to warrant preemption." Pet. App. 26. But the court held that the second sentence of Section 1555-D, which imputes knowledge of a package's tobacco contents to a carrier in certain circumstances (such as when the shipper is on the Attorney General's list of unlicensed retailers) "has the effect of forcing [carriers] to change [their] uniform package-processing procedures" and "prescrib[es] how carriers must operate." *Id.* at 28. The court of appeals thus held that part of Section 1555-D preempted under the FAAA Act. *Ibid.*

DISCUSSION

The court of appeals correctly ruled that the FAAA Act preempts Section 1555-C(3)(C) and the imputed knowledge portion

of Section 1555-D in Maine's Tobacco Delivery Law. The court's holding leaves open other means by which the State can effectuate its important policy—which the Federal Government shares —of preventing tobacco sales to minors. Indeed, the court of appeals left standing generally applicable provisions of Maine law that, by their own force, prevent carriers from delivering tobacco to minors. The court of appeals' ruling does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

A. 1. The FAAA Act expressly preempts, with certain exceptions, any state law that is "related to a price, route, or service" of a motor carrier (including one affiliated with an air carrier) engaged in the transportation of property. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). Congress modeled the FAAA Act's preemption provisions on the similarly worded provision in the ADA that preempts state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708.[2] In *Morales*, this Court explained that "the key phrase * * * 'relating to' * * * express[es] a broad pre-emptive purpose." 504 U.S. at 383. The Court noted that in construing the identical words "relating to" in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), it had held that "a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan.'" 504 U.S. at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court adopted the same standard for the ADA: "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Ibid.*

Morales rejected the argument that only state laws that actually prescribe rates, routes, or services are preempted. As the Court explained, such an interpretation would effectively rewrite

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[2] As amended, the ADA provides that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1).

the statute by substituting the word "*regulate*" for the phrase "relating to." 504 U.S. at 385. The Court also found unconvincing the argument that "only state laws specifically addressed to the airline industry are pre-empted." *Id.* at 386. Such an interpretation "ignores the sweep of the 'relating to' language" and would "creat[e] an utterly irrational loophole." *Ibid.* The Court noted in this regard that under ERISA, a state law "may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ibid.* (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)); see also *ibid.* (citing *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (state law mandating benefits in group policies sold by insurance companies "relates to" an ERISA plan that purchases such policies)).

Applying the foregoing principles, the Court in *Morales* found that guidelines issued by state attorneys general regarding airline fare advertising, which purported to enforce generally applicable state consumer protection laws, 504 U.S. at 379, were preempted because the guidelines contained an "express reference" to airline fares and also because it was clear as an economic matter that the guidelines had a "forbidden significant effect" upon fares, *id.* at 388. The Court stressed, however, that, in so holding, it was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." *Id.* at 390. Nor, the Court continued, did it need to address whether regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates, because "the connection would obviously be far more tenuous." *Ibid.* Adapting to *Morales* a limiting principle of ERISA preemption, the Court explained that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Ibid.* (quoting *Shaw*, 463 U.S. at 100 n.21).

2. The FAAA Act was enacted two years after the decision in *Morales*. The Conference Report on the FAAA Act expresses the intent that the Court's "broad preemption interpretation" in *Morales* apply as well to the FAAA Act's comparably worded preemption provisions. H. Rep. 677, at 83. Subsequently, the Court held in *Wolens* that the ADA did not preempt state law breach-of-contract actions against an airline by participants in the airline's frequent flyer program. 513 U.S. at 228-233. The Court concluded that, although the ADA preempts States' imposition of obligations on airlines, as in *Morales*, it does not bar suits based on the airline's "own, self-imposed undertakings." *Id.* at 228. Such suits, the Court reasoned, simply hold an airline to its agreements—in *Wolens* itself, "to business judgments an airline made public about its rates and services." *Id.* at 229.

B. The question whether the provisions of Maine law at issue here are preempted by the FAAA Act must be considered in light of *Morales* and *Wolens*, as well as the Court's decisions construing the "relating to" language in ERISA's preemption clause, on which the Court extensively relied in *Morales*. Applying those principles, the court of appeals correctly held that the relevant provisions of Maine law are preempted.

1. The court of appeals concluded that Section 1555-C(3)(C), but not Section 1555-D, was preempted under the "reference to" prong of *Morales*. Pet. App. 23, 28. Although Section 1555-C(3)(C) does refer to use of a "delivery service," that fact alone does not require the provision to be set aside under the "reference to" test. Because the "reference to" test results in preemption without regard to the impact of the state law on the subject of federal regulation, this Court has given it a relatively narrow construction. The Court explained in *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A.*, 519 U.S. 316 (1997), with respect to ERISA's preemption provision, that a state law is invalid under the "reference to" test if it "acts immediately and exclusively upon ERISA plans," or

"where the existence of ERISA plans is essential to the law's operation." *Id.* at 325. *Dillingham* gave as an example of a statute that acts "exclusively upon ERISA plans" the statute in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), which barred the garnishment of "[f]unds or benefits of [an] * * * employee benefit plan or program subject to * * * [ERISA]." *Id.* at 828 (quoting Ga. Code Ann. § 18-4-22.1 (1982) (repealed 1990)).

Section 1555-C(3)(C) is not invalid under *Dillingham*'s "reference to" standard. By its terms, Maine's statute applies to delivery services that are not covered by the FAAA Act. Maine defines "delivery service" to include "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers" 22 Me. Stat. § 1551(1-C). That definition encompasses carrier or delivery services (including USPS) that are not covered by the definition of "motor carrier" in the FAAA Act. For purposes of the FAAA Act, "motor carrier" is defined as "a person providing commercial motor vehicle * * * transportation for compensation," and "commercial motor vehicle" is in turn defined as a "self-propelled or towed vehicle used on the highways in interstate commerce" that meets particular minimum requirements, such as having a gross weight or rating of 10,001 pounds or being used to transport more than eight passengers for compensation. Pub. L. No. 109-59, Tit. IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (to be codified at 49 U.S.C. 13102(14) (Supp. V 2005)); 49 U.S.C. 31132(1)(A) and (B). Maine's law, on the other hand, would apply to small delivery vans and even commercial bicycle delivery services.

2. Although Maine's statutes are not preempted based on an impermissible "reference to" motor carriers, the court of appeals correctly concluded that Section 1555-C(3)(C) and the second sentence of Section 1555-D have a "forbidden significant effect," *Morales*, 504 U.S. at 388, on carrier services.

a. Although the direct objects of regulation in Section 1555-C(3)(C) are retailers, the FAAA Act is not limited to statutes that "actually prescrib[e] rates, routes, or services." *Morales*, 504 U.S. at 385. Rather, as the court of appeals recognized, it may also preempt laws that "limit retailers to hiring only those carriers that comply with the state-imposed mandates." Pet. App. 24. The requirements of Section 1555-C(3)(C)—in particular that the carrier obtain the signature of the purchaser, who also must be the addressee—would have a dramatic effect on the operations of motor carriers. As the court of appeals observed, "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age," as a consequence of the requirements imposed by Section 1555-C(3)(C), "all could affect timely deliveries." Pet. App. 23.

Congress's explicit purpose in enacting the FAAA Act's preemption provisions was to alleviate the burdens that state regulation had imposed on interstate commerce and the free flow of traffic. FAAA Act § 601(a), 108 Stat. 1605. The Act thus sought to eliminate the inefficiencies in carrier operations attributable to the then-existing patchwork of state regulation. See H. Rep. 677, at 87 ("The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."). The challenged provisions in Section 1555-C(3)(C) effectively require carriers to alter their uniform distribution and delivery operations in Maine in order for them to transport tobacco products in the State. If many States did the same, the resulting multiplicity of state laws would create the very patchwork of regulation that Congress sought to prevent when it deregulated the transportation industry.

Contrary to petitioner's contentions, the fact that some carriers offer services that resemble those specified by Maine in certain respects does not save the statute from preemption. Peti-

tioner notes (Pet. 23) that United Parcel Service (UPS), the carrier whose practices formed the basis of the record below, already "offers a type of delivery confirmation, adult-signature-required service." In petitioner's view, Maine's statute "merely requires that a *retailer* use a service that is provided by carriers," and therefore does not relate to carriers. *Ibid.* Where a particular service is generally offered by carriers, a court might well conclude that a state law that requires retailers to utilize that commercially available service in a particular class of sales —and that does so not as a "guise" to regulate motor carrier services as such (see H. Rep. 677, at 84), but in order to further health, safety, or similar purposes independent of the transportation industry—does not have a "forbidden significant effect" on carrier services, and therefore is not preempted. *Morales*, 504 U.S. at 388. The fact that carriers had made an independent commercial decision to offer a service would be strong evidence that, as Congress intended, the carriers' "[s]ervice options [were] dictated by the marketplace; and not by an artificial regulatory structure." H. Rep. 677, at 88. While such a state law might have some effect on the relative volumes of different carrier services, it would require no modification in carrier services or package-delivery procedures. And, while the increase in market demand for such a service might "alter[] the incentives" of carriers that had not competed for that segment of the market before, it would "not dictate the choices" of those carriers. *Dillingham*, 519 U.S. at 334.

Carriers may also be subject to generally applicable laws that prohibit furnishing tobacco products to minors. Indeed, Maine has such a provision, 22 Me. Stat. § 1555-B(2) (Supp. 2006), which respondents did not challenge. Maine also has a generally applicable statute that provides a safe harbor to one who furnishes tobacco to a person under 18 in reliance on a fraudulent identification. *Id.* § 1555-B(10). The FAAA Act does not preclude a State from regulating such primary conduct any more than it

precludes "state laws against gambling and prostitution as applied to airlines." *Morales*, 504 U.S. at 390. It may be that Maine could also apply to motor carriers a generally applicable requirement that any person to whom tobacco products are being furnished as part of a commercial transaction must show government-issued identification containing a photograph and indicating that the person is of legal age to purchase tobacco products.

Here, however, the service that Maine has prescribed by statute is one that, as far as the record reflects, *no* carrier offers in the marketplace. Maine does not merely require that an adult sign for the package (a service that petitioner contends is generally available (Pet. 23)). It very specifically mandates that "the *addressee* * * * must sign for the package" and that the carrier must check the photo identification "of the *addressee*." 22 Me. Stat. § 1555-C(3)(C)(2) and (3) (2004) (emphases added). As the district court held (Pet. App. 64-65), and the court of appeals affirmed (*id.* at 22-23), such a requirement is very different from the service UPS offers, which permits a delivery person to leave a package with "whoever answers the door or with a neighbor or in the office mailroom." *Id.* at 64. See Br. in Opp. 3, 19-20.

b. The first sentence of Section 1555-D provides that a "person" may not knowingly transport or cause to be delivered to a person in the State a tobacco product purchased from a person who is not licensed as a tobacco retailer in the State, unless the delivery is to a licensed tobacco distributor or retailer. The court of appeals held that that prohibition is not preempted by the FAAA Act. It reasoned that tobacco products purchased by a consumer from an unlicensed retailer are contraband, Pet. App. 25 (citing 22 Me. Stat. § 1555-C(7)), and that, like the laws prohibiting prostitution and gambling referred to in *Morales*, laws barring transportation or delivery of contraband (including, *e.g.*, illegal drugs) regulate primary conduct and have only a "tenuous, remote, or peripheral" relation to carrier services. Pet. App. 25-

26 (quoting *Morales*, 504 U.S. at 390). As the court of appeals noted, the first sentence of Section 1555-D requires that carriers and other persons in the State not act as knowing accomplices in the illegal sale of tobacco products. "It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." *Id.* at 26. Respondents do not challenge that holding.

The second sentence of Section 1555-D goes further, however, and the court of appeals correctly held it preempted. That provision imputes to a person knowledge that a package contains tobacco products "if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)]" or if the seller is "listed as an unlicensed tobacco retailer" on the Attorney General's list. 22 Me. Stat. § 1555-D. That list is provided only to "delivery service[s]," which are required to "maintain [its] confidentiality." *Id.* § 1555-D(1).

In order to avoid imputed knowledge, carriers are, in effect, forced to change package-processing procedures that are otherwise uniform across the nation. For "*every* package destined for delivery in Maine," the carrier "must specially inspect" the package to determine whether it "is marked as containing tobacco or if the seller's name appears on the Attorney General's list." Pet. App. 27 (emphasis added). If the package is so marked, or the shipper is on the list, the carrier "must segregate the packages * * * and research whether the addressee is a Maine-licensed retailer or distributor who can receive the package." *Id.* at 27-28. The State is, in other words, trying to "dictate * * * a carrier's delivery procedures." *Id.* at 28.

C. Petitioner's arguments that the court of appeals erred in various respects are unpersuasive.

1. Petitioner contends (Pet. 17) that the FAAA Act "does not preempt a state's exercise of its traditional police powers in noneconomic areas." While preemption under the FAAA Act is subject to the limitations identified in *Morales* and *Wolens* and

discussed above (see pp. 11-12, *supra*), petitioner's argument for a *categorical* police-powers exception is inconsistent with the language employed in the FAAA Act and the legislative history's endorsement of the Court's "broad preemption interpretation" of similar language in *Morales*. See H. Rep. 677, at 83. Notably, the state laws held to be preempted in *Morales*, 504 U.S. at 379-380, as well as in *Wolens*, 513 U.S. at 226-228, were consumer fraud laws enacted pursuant to traditional state police power. See *California* v. *Zook*, 336 U.S. 725, 734 (1949) (protecting consumers from fraud is a well-established police power).

The FAAA Act's explicit delineation of exceptions to the preemption provisions precludes the categorical police powers exception envisioned by petitioner. Congress clearly considered traditional areas in which the States might exercise regulatory authority over carriers and specified which of those areas were not subject to preemption (motor vehicle safety, route controls for specified purposes, insurance requirements, and the transportation of household goods). 49 U.S.C. 14501(c)(2), 41713(b)(4)(B); see H. Rep. 677, at 84, 85. Petitioner does not contend that the Tobacco Delivery Law fits within any of those exceptions. Rather, relying on a statement in the legislative history that the list of "[m]atters not covered" by the preemption provisions was "not intended to be all inclusive," petitioner contends that the listed exceptions are merely illustrative of a general rule that the statute does not preempt noneconomic regulation. Pet. 22 (quoting H. Rep. 677, at 84). That argument is misconceived.

The text of the preemption provisions states that "*[e]xcept as provided in*" specified provisions, a State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of a carrier. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). It would make no sense for Congress to preempt state law "except as provided in" specified provisions that narrowly define areas in which States were to

retain authority if Congress had meant to incorporate a categorical exception for all noneconomic State regulation. For example, it is telling that, whereas Congress specified that States may regulate the transportation of one particular commodity—household goods—it did not include an exception for other items or for tobacco in particular. When Congress creates exceptions in a statute, courts have no authority to create others; rather, "[t]he proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000).

The areas in which Congress specified that States may undertake regulation for safety and related purposes are ones in which other Acts of Congress explicitly or impliedly allow for state regulation. See 49 U.S.C. 5112 (highway routing of hazardous materials); 49 U.S.C. 31111(f) (motor vehicle length limitations); 49 U.S.C. 31114(b) (commercial motor vehicle access to interstate and federal aid highways); 49 U.S.C. 31138 (2000 & Supp. IV 2004) and 49 U.S.C. 31139 (minimum motor carrier financial responsibility). Significantly, whereas Congress expressly permitted States to enact safety regulations with respect to motor vehicles, it at the same time provided the Secretary of Transportation with authority to override those state laws. 49 U.S.C. 31141. Petitioner urges the Court to engraft a broader, non-textual exception for all state safety regulations, but with no corresponding authority in the Secretary of Transportation to preempt such laws.

A general exception for state regulation of motor carriers on safety grounds would make major inroads on the FAAA Act's general rule of preemption. Tellingly, petitioner's position quickly progresses to its logical endpoint: "So long as the state law is not intended to regulate the economics of the carriers, such as setting rates or establishing tariffs, there is no preemption under the FAAAA." Pet. 23. That contention simply rephrases the argument rejected by this Court in *Morales* that the

ADA preempts only state laws "actually prescribing rates, routes, or services." 504 U.S. at 385.

Thus, although the legislative history identifies "[s]tate economic regulation of motor carrier operations" as the principal focus of the FAAA Act's preemption provisions, H. Rep. 677, at 87, the "related to" terminology in the statute's text belies the notion that that was Congress's *only* concern.[3]

2. Petitioner erroneously suggests (Pet. 18-19) that the Court should infer an exception to state laws addressed to combating tobacco use by minors because such laws share a "common purpose[]" with federal law. Pet. 19 (quoting *PhRMA* v. *Walsh*, 538 U.S. 644, 666 (2003)). Although the Federal Government shares the State's interest in combating youth tobacco use, Congress has not authorized States to enact laws within the scope of the FAAA Act's preemption provision in furtherance of that goal.

The "Synar Amendment" in the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394, to which petitioner refers (Pet. 18), provides that the Secretary of Health and Human Services (HHS) "may" award a grant to any State that "has 'in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute

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[3] Petitioner's reliance (Pet. 20-21) on *City of Columbus* v. *Ours Garage & Wrecker Services, Inc.*, 536 U.S. 424 (2002), is misplaced for similar reasons. That case concerned whether the State's regulatory authority over local tow-truck operations, preserved in 49 U.S.C. 14501(c)(2)(A), could be delegated to municipalities. 536 U.S. at 428. In that quite different context, the Court observed that "[t]he problem to which the congressional conferees attended was '[s]tate *economic* regulation'; the exemption in question is for state *safety* regulation." *Id.* at 440-441 (quoting H. Rep. 677, at 87). Nothing in that brief comment or elsewhere in *Ours Garage* suggests a retreat from the broad interpretation of the preemption provision in *Morales*; in fact, the meaning of "related to" in the general rule of preemption in 49 U.S.C. 14501(c)(1) was not even at issue in *Ours Garage*. Nor did the Court suggest that Congress had provided a broad exemption for *all* state safety regulation, beyond the listed exceptions.

any such product to any individual under the age of 18." 42 U.S.C. 300x-26(a)(1). By its terms, the Synar Amendment does not mandate state laws related to motor carrier services regarding tobacco products.[4] And the focus of HHS's regulation that implements the Synar Amendment is on restricting over-the-counter and vending machine sales. See 45 C.F.R. 96.130. The court of appeals therefore correctly concluded that the FAAA Act and Synar Amendment "can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12.[5]

Indeed, the court of appeals' decision leaves in place other provisions of the Tobacco Delivery Law (and leaves open the possibility of other laws) that do prohibit all persons (including carriers) from knowingly providing tobacco products to minors. As discussed above, see p. 5, *supra*, the court of appeals expressly upheld the first sentence of Section 1555-D, which bars any person from knowingly delivering contraband tobacco. Pet. App. 25. The court of appeals' decision also leaves in place (and respondents did not even challenge) the State's general prohibition that "[a] person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Stat. § 1555-B(2) (Supp. 2006). On its

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[4] The Synar Amendment's reference to a "distributor of tobacco products," construed in context and in accordance with the ordinary meaning of those words, refers to a wholesaler of such products, rather than a carrier that transports the products. That interpretation is also consistent with the use of the terms "distributed" and "distributor" in Maine's Tobacco Delivery Law. See, *e.g.*, 22 Me. Stat. § 1555-B(4) and (6) (Supp. 2006); *id.* § 1555-D (2004).

[5] Notably, even before enactment of the statutory provisions here at issue in 2003, Maine's law generally prohibiting tobacco sales to minors qualified the State for a Synar Amendment grant, and the State easily satisfied HHS's target rate of no more than 20% sales-to-minors violations. See *State Synar Non-Compliance Rate Table, FFY 1997 - FFY 2005* (visited May 24, 2007) <http://prevention. samhsa.gov/tobacco/synartable_print.htm>.

face, that provision would appear to apply to a carrier (just as to any other "person") who "furnish[es]" tobacco products to a minor.[6] Other States have banned outright the direct shipment of cigarettes to individual consumers. Cal. Amicus Br. 5; see, *e.g.*, Md. Code Ann., Bus. Reg. § 16-222 (2004); *id.* § 16-223 (Supp. 2006); Ark. Code Ann. § 26-57-203 (LexisNexis Supp. 2005); *id.* § 26-57-215 (Michie 1997). See *Arkansas Tobacco Control Bd.* v. *Santa Fe Natural Tobacco Co.*, 199 S.W.3d 656 (Ark. 2004) (upholding, against a dormant Commerce Clause challenge, a ban on non face-to-face retail sales of cigarettes); *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2d Cir. 2003) (same).[7] Such laws, which do not dictate how carriers must provide service, do not have a "forbidden significant effect" so as to warrant preemption. See also pp. 11-12, *supra*.

3. Petitioner's reliance on *Granholm* v. *Heald*, 544 U.S. 460 (2005), Pet. 20, is misplaced. There, the Court struck down, as unconstitutional under the Commerce Clause, state statutes that prohibited or restricted out-of-state wineries from shipping wine directly to in-state consumers. In concluding that the States had failed to justify such discriminatory regulation, the Court noted that there were other measures States could undertake to prevent minors from obtaining wine by mail: "For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." 544 U.S. at 491.

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[6] Maine's liquor laws similarly prohibit the "knowing[]" delivery of liquor to a minor; however, in contrast to the Tobacco Delivery Law, they do not prescribe particular procedures with which carriers must comply or services that they must offer in order for retailers to utilize their services. 28-A Me. Rev. Stat. Ann. §§ 2073(3)(B), 2077(3), 2081(1)(A) (West 2007).

[7] In connection with litigation, the three major commercial carriers, UPS, FedEx, and DHL, entered into settlement agreements with New York pursuant to which the carriers agreed not to ship cigarettes to individual customers in the United States. See Pet. 12.

The Court's passing statement in *Granholm* did not address preemption under the FAAA Act. Moreover, that provision of the Model Direct Wine Shipment Bill differs in significant respects from the Tobacco Delivery Law provisions here at issue. Unlike Section 1555-C(3)(C), it does not mandate that wine shippers use only carriers that provide certain specified services that would require carriers to alter their usual distribution and delivery procedures or offer an idiosyncratic service. Rather, the Model Bill would impose on shippers an obligation to label conspicuously the package as containing alcohol and to select a delivery service that would require the signature of a person over 21 years of age.[8] To the extent such an adult-only-signature service is commercially available, a state law requiring shippers to utilize such a service would not, as we discuss above, see p. 11, *supra*, be a law "related to" motor carriers.

D. The court of appeals' decision does not, in any event, conflict with a decision of any other appellate court. Petitioner contends that the court of appeals' decision is inconsistent with the Ninth Circuit's decision in *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184, 1189 (1998), cert. denied, 526 U.S. 1060 (1999) and the Second Circuit's in *Ace Auto Body & Towing, Ltd.* v. *City of New York*, 171 F.3d 765, cert. denied, 528 U.S. 868 (1999). There is no conflict.

In *Mendonca*, the Ninth Circuit held that California's Prevailing Wage Rate Law (CPWL)—a law of general applicability, not specifically directed to employers in the transportation business—has only an "indirect, remote, and tenuous" effect on motor

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[8] Section 3(c) of the Model Direct Wine Shipment Bill (1997) states: "All Wine Direct Shipper Licensees shall * * * [e]nsure that all containers of wine shipped directly to a resident in this state are conspicuously labeled with the words 'CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.'" See *Model Direct Wine Shipment Bill* (visited May 24, 2007) <www.wineinstitute.org/programs/shipwine/Model_Direct_Shipping_Bill.pdf>.

carrier prices, routes, and services, and, thus, is not preempted by the FAAA Act. 152 F.3d at 1189. Although the Ninth Circuit acknowledged that the CPWL would likely have some effect on carrier prices and operations, such effect would be indirect and would not "*acutely* interfer[e]" with the carriers' discretion in how they conduct their fundamental operations. *Ibid.* The Tobacco Delivery Law, by contrast, specifies particular procedures for carriers to follow. Notably, the First Circuit saw no inconsistency between its decision and *Mendonca*, which the court cited favorably six times, including as authority for upholding the first sentence of Section 1555-D. See Pet. App. 25-26.

Ace Auto Body, on the other hand, is entirely inapposite. In that case, the Second Circuit rejected New York City's argument that a city ordinance regulating the towing of disabled vehicles was not within the general rule of preemption, 171 F.3d at 771, and proceeded to the "principal question" whether the ordinance was "saved from preemption by language in § 14501(c)(2)(A), which preserves the 'safety regulatory authority of a State with respect to motor vehicles.'" *Id.* at 772. The court's holding that the phrase "safety * * * with respect to motor vehicles" encompassed the city's scheme to tow abandoned and stolen cars and to eliminate the practice of towers "chasing" accidents (*id.* at 774-775) has no relevance to the question presented here regarding the preemptive scope of the FAAA Act's general rule with respect to the Tobacco Delivery Law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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